II. The Congressional Intent Is Shown In The Plain Language of 47 U.S.C. § 224 And Addition Of §§ 224(f) and 224(e) And Changes Made To § 224 (c) But Not To §§ 224(b)(1) And § 224(b)(2).

Congress in 1996 adopted § 224(f)(2) as an equal part of 47 U.S.C. § 224, a section largely ignored by Respondents. At the same time, Congress did not change either § 224(b)(1) or § 224(b)(2). Even in 1996, Congress considered regulation of the attached wireline "the attachment" as distinct from regulation of the right of nondiscriminatory access.

As part of the 1996 amendments, Congress amended the Pole Attachments Act to end the competitive advantage of cable companies with respect to pole attachment rates and to ensure that pole owners would not give any attaching entity preferential or discriminatory access rights, including any telecommunications affiliate or subsidiary of the pole owners. (*Southern Company*, p. 14.) Congress added § 224(f) providing:

> § 224(f)(1). A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.
>
> § 224(f)(2). Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way on a non-

discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(Emphasis added.)

Congress also amended §§ 224(a)(5) and (6) to bring the competing telecommunications companies within the regulated rate protections of the Pole Attachments Act and added §§ 224(e)(1) through (4) establishing new rate parameters for telecommunications attachments.

1. **Section 224(e)(1). Congress Did Not Authorize Or Direct The FCC To Adopt Or Enforce Access Rules, But Did Direct The FCC To Adopt Or Enforce Rate Rules.**

As part of its 1996 amendments to the Pole Attachments Act, Congress in § 224(e)(1) specifically directed the FCC to adopt rules and regulations to implement the new rate §§ 224(e)(2)-(4):

> § 224(e)(1). The Commission shall, no later than 2 years after the date of the Telecommunications Act of 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall

ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

(Emphasis added.)

Congress has shown a pattern of directing an agency to adopt rules and regulations when it initially delegates authority to an agency and when it expands the scope of that authority. Thus in 1978 upon adoption of the Pole Attachments Act, Congress directed the FCC "within 180 days from February 21, 1978 ... [to] prescribe rule regulations to carry out provisions of this section." (47 U.S.C. § 224, n. 1, Lawyers Edition (1995)(showing revision in 1994 to present form). In 1996 as part of the Telecommunications Act, Congress directed the FCC to "[w]ithin 6 months after the date of enactment of the Telecommunications Act of 1996 to establish regulations to implement the requirements of this section" [251] which created a new duty on the part of the local exchange carriers to provide for interconnection and nondiscriminatory access to [telecommunications] networks on an unbundled basis and for collocation.

In 1996, as part of the Pole Attachments Act, Congress similarly created a new duty of nondiscriminatory access to electric utility poles, ducts, conduits and rights-of-way, but did not direct rulemaking as to the new duties and rights it created in § 224(f). At the same time, Congress in § 224 did expressly direct the FCC to adopt rules with respect to the new rate structure. 47 U.S.C. § 224(e)(1). If

Congress had intended the FCC to adopt rules and regulations and to administer and enforce § 224(f), Congress also would have directed the FCC to adopt rules and regulations with respect to the access rights and duties created in §§ 224(f)(1) and (2). Congress did not.

2. Sections 224(b)(1) And 224(c). Congress Did Not Amend § 224(b)(1) But Did Amend § 224(c) Showing Its Intent That Technical Issues of Electric Utility Capacity, Safety, Reliability and Engineering Requirements Remain With The States.

(a) Section 224(b)(1)

Respondents rely on the Congressional delegation of general rulemaking authority to the FCC in 47 U.S.C. § 224(b)(1) to regulate takings issues involving the capacity, safety, reliability and engineering requirements of the electric utility pursuant to §§ 224(f)(1) and (f)(2). (NCTA, p. 23, FCC, pp. 15-16, AT&T, p. 19.) This reliance is misplaced. The fact that Congress, in 1996, did not amend § 224(b)(1) or (b)(2), the general jurisdictional sections, but did, in 1996, amend § 224(c)(1) is significant. Section 224(b)(1) provides:

> (1) Subject to the provisions of subsection(c) of this section, the Commission shall regulate rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and adopt procedures necessary and appropriate to hear and resolve complaints

concerning such rates, terms and condition. For purposes of enforcing any determinations resulting from complaint procedure established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders . . . ." (Emphasis added.)

The plain statutory language shows that both before and after 1996, the FCC's expressly delegated authority is subject to 47 U.S.C. § 224(c). It also shows that before 1996, the FCC' s general jurisdiction was over "rates, terms, and conditions" of pole attachments and did not include regulation of access and that this did not change after 1996.

Respondents lengthy assertions that the FCC has expertise and experience in access issues including the right of the electric utility to deny access based on insufficient capacity, safety, reliability and engineering principles because since 1978 the FCC has regulated "pole attachments," are flatly wrong. The FCC has never regulated the extent or conditions of a takings rights or physical access to electric facilities and has never been the regulator or enforcer of electric utility capacity, safety, reliability and engineering requirements. These were not issues within the Pole Attachments Act prior to 1996. As set out at length in Petitioners' briefs, the FCC is not the agency charged with regulatory control of the electric utility. The lack of expertise of the FCC in technical physical plant considerations

even of telecommunications companies was made clear in 47 U.S.C. § 251(c)(6), *supra*, providing for state commission review of the practicality of physical collocation for "technical reasons or because of space limitations." "Even WorldCom understands that, in fact, § 224(f)(2) allows utilities to give their core electric needs precedence over attachments for non-electric services." (WorldCom, p. 17.) It is not for the FCC to determine what these core electric needs are or how they may be achieved. Congress did not suddenly give the FCC this authority in 1996 in adopting § 224(f).

The plain statutory language shows that before § 224(f) was added to the Pole Attachments Act in 1996, "access" and the "terms and conditions of access" were not considered by Congress or by the FCC to be a "term or condition" of pole attachment. Nor were access issues brought before the FCC for determination and enforcement. The FCC rules and regulations prior to 1996 required that as an express condition of filing a pole attachments complaint, the party desiring to seek FCC review must allege that "[it] currently has attachments on the pole." 47 CFR § 1.1404(d)(2) (10-1-94, Edition). Regulating pole attachments meant and still means regulating that already attached to the pole.

(b) Section 224(c)(1)

By virtue of § 224 (c)(1), the FCC's rulemaking and enforcement jurisdiction under § 224 (b)(1) after 1996 still does not include regulating "access." Congress

left unchanged § 224(b)(1) both authorizing and limiting the scope of the FCC's jurisdiction by making it subject to § 224(c). Section 224(c)(1) is the only jurisdictional section in 47 U.S.C. § 224 which Congress amended in 1996 to insert the term "access." Section 224(c)(1) expressly and unambiguously provides:

> Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) for pole attachments in any case where such matters are regulated by a State.
>
> (Emphasis added.)

The importance of § 224(c) here, is not, as Respondents assume, that states may elect to regulate pole attachments. The significance is that § 224(c)(1) shows that Congress differentiated between "rates, terms, and conditions" of the attachment and "access" to the poles, ducts, conduits, and rights-of-way. It shows Congress intended the access issues to remain with the states and that the FCC's jurisdiction continued to be over the attached wirelines and not over the technical or takings issues involved in access rights. This is because access issues involve capacity, safety, reliability and engineering requirements outside the regulatory authority and expertise of the FCC and within the historical and regulatory expertise of the state public service commissions.

Significantly even though Congress did amend § 224(c)(1) to include the term "access," Congress did not amend §§ 224(c)(2) and (3) to also include "access." Sections 224(c)(2) and (3) require that a state which regulates "the rates, terms, and conditions" for pole attachments must certify such regulation to the FCC state. These sections were not changed in 1996. The plain language shows that states do not have to certify to the FCC that, in addition to regulating "rates, terms, and conditions" for pole attachments, they are also regulating "access." Congress knew that states regulate the technical safety, reliability and engineering requirements of the electric distribution facilities and intended that the states continue to do so. (*See* FPL, Addendum to Brief, Tab 5, §§ 366.04(5) and (6), Fla. Stat. 1999.) *See United States v. Henry*, 111 F.3d 111, 114 (11th Cir. 1997), *cert. denied*, 522 U.S. 894 (1977)(where Congress includes language in one section but omits it in another, Congress acts intentionally and purposely).

The 1996 Act did not change the established regulatory scheme for the technical and physical requirements of the electric utility poles, ducts, conduits and rights-of-way.

III. The FCC Has No Gap Jurisdiction To "Allow" The Electric Utility To Apply The NESC Or To Make Determinations As To State Real Property Law In Use Of Rights-Of-Way Or To Interfere With The State And Federal Regulatory Framework For Electric Utility Reliability.

The FCC's suggestion that it was "favoring" the electric utilities by "allowing" them to continue to apply the NESC standards and FERC and OSHA and other recognized requirements (FCC, p. 10) and that the electric utilities somehow admit FCC regulatory jurisdiction under §§ 224(f)(1) and (2) because they did not challenge this "rule" is nonsense. It shows both the futility and absurdity of assuming that the FCC has jurisdiction to regulate, make determinations and enter cease and desist orders as to the exercise of the electric utility of its right to deny access under § 224(f)(2). The legal and common sense reality is that this FCC "rule" is superfluous -- the electric utility *must* apply and is bound by the applicable NESC, FERC, OSHA and NERC[6] standards regardless of what the FCC says, does or adopts. The FCC does not have the authority to tell the electric utility that it may or may not follow the NESC, FERC, OSHA, or NERC standards--even in connection with pole attachments. This "rule" was not challenged because it can be ignored.

---

[6] "NERC" is the North American Electric Reliability Council.

The FCC at one time admitted that access to rights-of-way depends upon the scope of a utility's ownership or control of an easement or right-of-way and "is a matter of state law." *First Order and Report*, ¶ 1179.

The state and regulatory schemes for the electric utility plant and operational concerns are identified in the briefs of Petitioners.

IV. Attaching Entities Are Not Left Without Remedy.

The attaching entities are not left without remedies in access disputes. If an attaching entity has a technical dispute or question about the electric utility's exercise of its right to deny access for insufficient capacity, or reasons of safety ability or engineering requirements, it can take that complaint to the state public service commission. *See, e.g., GTE Service Corporation v. FCC, supra,* at 421. If an attaching entity has a complaint based on failure to provide or to deny access on a nondiscriminatory basis, the attaching entity has a remedy in the courts. *See AT&T Communications of Virginia v. Bell Atlantic-Virginia,* 197 F.3d 663, 670 (4th Cir. 1999)("[u]nequal access is a statutory injury that is sufficient to confer standing . . . Congress may enact statutes creating legal rights, the violation of which creates standing, even though no injury would exist without the statute" [citation omitted]). In a court, the attaching entity as well as the electric utility whose property is being invaded and whose core electric needs are at stake, will

have an impartial hearing under the rules of civil procedure and evidence which do not allow hearsay and unsupported allegations.[7]

V. Specific Issues Under § 224.

FPL relies on its Petition for specific objections to the specific "rules" which the FCC adopted by means of its nonexistent gap jurisdiction. *See also Williamson Tobacco Corporation, supra* at 1315, citing *MCI Telecommunications Corp. v. American Telephone & Telegraph Co*, 512 U.S. 218, 231 (1994); *United States v. Carmack, supra.*

1. Capacity. The FCC has no regulatory authority over electric utility capacity issues. In addition, the term "insufficient capacity" is not ambiguous in context of technical requirements for pole attachments and as used in § 224(f)(2). Under the FCC's rationale and assumption of initial "gap jurisdiction," if the term "insufficient capacity" as used in § 224(f)(2) is ambiguous in and of itself or if Congress did not precisely define all possibilities which that term could encompass, the FCC can create "specific issues" as to every term in § 224(f)(2),

---

[7] *Compare* the FCC's order in *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, PA 99-005, ¶ 6 (denying utility's motion for evidentiary hearing because "pole attachment t complaint procedures are intended to ensure a simple and expeditious process for resolving complaints.") (FPL Brief, Tab 4.)

including electric utility safety, reliability or engineering purposes. *See dissent*, FCC Commissioners Powell and Furchtgott-Roth. (FPL Brief, p. 14.)

2. **Transmission Facilities**. The FCC has no regulatory authority over electric utility transmission facilities. In addition, the FCC has revised the statute to add the term "tower" in addition to the term "pole." There is no discrimination and thus no violation of § 224 if an electric utility allows no telecommunications or cable wireline attachments to its transmission facilities or to certain classes of transmission facilities, including those of its own affiliate telecommunications company.

3. **Worker Qualifications**. The FCC has no regulatory authority over electric utility determination of worker qualifications. In addition, there is a major difference between attaching cable or wires in the space below the power zone on distribution facilities and installing facilities in the power or "safety" zone of either transmission or distribution facilities. The practice today is for the attaching entities to install their own facilities on distribution facilities below the power or safety space. This historical practice will continue absent the FCC's rule and is not objected to by FPL. Regulating the "rates, terms, and conditions" of pole attachment is not the same as regulating the labor practices of the electric utility. *See* statement of FCC Commissioner Furchtgott-Roth. (FPL Brief, pp. 39-40.) Where the electric utility does not allow even its own telecommunications affiliate

to work in the electric utility safety space or other critical areas, it is not discriminating by not allowing other attaching entities to work there. The FCC has rewritten the statute to require not merely "nondiscriminatory access" but "more favorable access."

4. "Any" Facility. The FCC has no regulatory authority over electric utility determination of the mandatory access provisions of § 224(f) or to create additional takings rights through "gap" jurisdiction with respect to that mandatory access. The FCC may not rely on the word "any" in § 224(f)(1) for its interpretation that Congress intended to create a vastly expansive blanket right of mandatory access to every single pole and every single category of poles, including transmission facilities, whether or not such class of facilities are used for wire communications attachments and whether or not the electric utility has ever allowed that type of attachment, including by its own affiliate. (FCC Brief, pp. 28-29.) Contrary to the FCC's argument, "any" when read in context does not always mean "any." *See Food and Drug Administration, supra.*

5. Wireless. This court should not revisit the wireless issue in this case.

VI. The Plain Language And Common Sense Dictate That A Governmental Entity that Requires Relocation of Utility Facilities to Construct A Road Is Not "Any Other Entity" Within The Meaning of § 224(i).

The FCC's interpretation of § 224(i) to require that a pole owner is responsible for the costs of relocating all attachers when relocation is required by a government, defies common sense and decades of practice. The precise issue was not even raised until proclaimed by the FCC in its Order on Reconsideration, *Id.*, ¶ 106. The plain statutory language in § 224(i) means that any attached entity should not have to pay for relocation of its attachments when relocation is required by others who have no legal right to require such relocation at the cost of the attaching entity. Congress did not intend to rewrite state or federal law which considers wirelines as "using" public rights-of-way or to require a utility user of a public right-of-way to relocate its facilities at its own expense when required by the government owner of the right-of-way. Nor is there any common sense in a requirement that the pole owner pay for the cost of relocating third party facilities when that relocation is requested by a private landowner. As set forth in FPL's Brief, pp. 32-39 such interpretation is also arbitrary, capricious and unreasonable. *See Food and Drug Administration, supra.*

VII. Precedent Setting Case.

The court's determination as to the FCC's expansion of its own jurisdiction under § 224 and the implications and exercise of that expansion is precedent setting. The regulation of access to electric poles, ducts, conduits and rights-of-way involves the integrity of the electric utility grid and core electric needs. Whether the FCC, with no experience or expertise, will be allowed to change the existing scheme for regulating the electric utility plant and assume regulatory, administrative and enforcement responsibility for access to electric utility facilities, including the right of the electric utility to deny such access where there is insufficient capacity and for reasons of safety, reliability and engineering purposes makes this an extraordinary case.

A court must be guided by statutory language and common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency. Here, "there is reason to hesitate before concluding that Congress has intended such an implicit delegation." *Food and Drug Administration v. Brown & Williamson Tobacco Corporation*, *supra*, at p. 1314. "A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration." *Id. citing* Breyer, Judicial Review of Questions of Law and

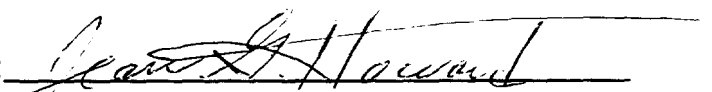
Policy, 38 *Admin. L. Rev*, 363, 370 (1986). The issues in this case are not "interstitial" or "gap" issues subject to "daily administration" by the FCC under 47 U.S.C. § 224 and § 224(f).

CONCLUSION

The FCC has no jurisdiction to regulate or enforce the third party mandatory access rights to the more critical electric utility infrastructure or to expand the rights and duties under § 224(f) by filling in alleged statutory "gaps." Congress did not intend in § 224(i) that the pole owner pay for relocations of attaching entities when a governmental or private landowner requests or demands that the pole (and therefore all attaching entities) be relocated. The FCC's rules and "guidelines" adopted pursuant to §§ 224(f)(1) and 224(f)(2) and 224(i) should be set aside.

Respectfully submitted,

FLORIDA POWER & LIGHT COMPANY

By: 

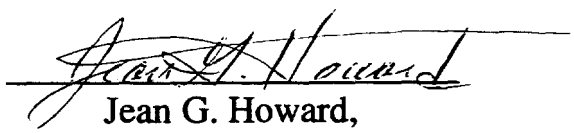
Jean G. Howard
9250 West Flagler Street
Miami, Florida 33174
Telephone: (305) 552-3929

Attorney for Petitioner
Florida Power & Light Company

Dated: November 6, 2000

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief of Florida Power & Light Company complies with the word limit set forth in Federal Rules of Appellate Procedure 32 (a)(7) and contains 6703 words, excluding the certificate of type size and style, the table of contents, the table of citations the certificate of compliance and the certificate of service.



Jean G. Howard,
Senior Attorney

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Reply Brief was served by Petitioner Florida Power & Light Company on this 6th day of November, 2000 by U.S. mail, to the following counsel of record:

Gregory M. Christopher, Esquire (8-A814)
Christopher J. Wright, Esquire
Office of General Counsel
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, DC 20554

Counsel for the Federal
Communications Commission

Robert J. Wiggers, Esquire
Robert B. Nicholson, Esquire
Appellate Section, Antitrust Division
U.S Department of Justice
601 D Street, N.W., Room 10535
Washington, DC 20530-0001

Counsel for United States of America

Shirley S. Fujimoto, Esquire
Christine M. Gill, Esquire
Thomas P. Steindler, Esquire
McDermott, Will & Emery
600 13th Street, N.W.
Washington, DC 20005-3096

Counsel for Southern Company, Et Al.

Paul Glist, Esquire
John D. Seiver, Esquire
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, DC 20006

Laurence W. Brown, Esquire
Edison Electric Institute, Inc.
701 Pennsylvania Avenue, N.W.
Washington, DC 20004

Alan G. Fishel Esq.
Eric D. Edmondson, Esq.
Arent Fox Kintner Plotkin &
Kahn, PLLC
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339

Counsel for CO Space
Services, Inc.

Brett W. Kilbourne, Esquire
United Telecom Council
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, DC 20036

Robert B. McKenna, Esquire
James T. Hannon, Esquire
US West, Inc.
Suite 700
1020 19th Street, N.W.
Washington, DC 20036

Counsel for US West, Inc.

Charles A. Zdebski, Esquire
Melissa L. Pignatelli, Esquire
Troutman Sanders LLP
401 9th Street, N.W.
Suite 1000
Washington, D.C. 20004-2134

Counsel for Pole Attachment Coalition

Renee Roland Crittendeon, Esq.
Deputy Chief Counsel
Telecommunications
Prism Communication Services,
Inc.
Suite 200
1667 K Street, N.W.
Washington, D.C. 20006

Anthony C. Epstein, Esquire
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036

Counsel for MCI Worldcom, Inc.

Joseph Dibella, Esquire
Bell Atlantic Network Service, Inc.
1320 North Courthouse Road
8th Floor
Arlington, VA 22201

Counsel for Bell Atlantic Network Service, Inc.

Daniel L. Brenner
Neal M. Goldberg
National Cable Television Assoc., Inc.
1724 Massachusetts Ave., N.W.
Washington, DC 20036

Counsel for National Cable Television Assoc., Inc.

Mark C. Rosenblum
AT&T Corp.
295 North Maple Avenue
Basking Ridge, NJ 07920

Counsel for AT&T Corp.

Jeffrey Sinsheimer
California Cable Television Assoc.
4341 Piedmont Avenue
P.O. Box 11080
Oakland, CA 94611

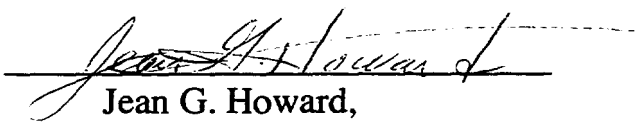
Counsel for California Cable Television Assoc.

David L. Lawson
Sidley & Austin
1722 Eye Street, N.W.
Washington, DC 20006

Counsel for AT&T Corp.

Thomas F. O'Neil, III
MCI WORLDCOM, Inc.
1133 19th Street, N.W.
Washington, DC 20006

Counsel for MCI WORLDCOM, Inc.



Jean G. Howard,
Senior Attorney